



## **Six Monthly Review of APES 330 *Insolvency Services***

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## **1. Executive Summary**

### **1.1. Background**

APESB issued APES 330 *Insolvency Services* in September 2009 which is effective for Appointments commencing on or after 1 April 2010. APES 330 replaced APS 7 *Statement of Insolvency Standards*.

### **1.2. Reason for this report**

In accordance with the constitution of the APESB, a review needs to be performed six months after a new standard is effective. This report presents a review of issues reported to the APESB by stakeholders such as insolvency practitioners, IPA, professional accounting bodies and firms, and proposed recommendations thereon for the consideration of the APES Board.

### **1.3. Issues identified**

#### *Issues arising from the issue of the 2<sup>nd</sup> edition of the IPA Code of Professional Practice*

The Insolvency Practitioners Association (IPA) has issued the 2<sup>nd</sup> edition of the IPA Code of Professional Practice which is effective from 1 January 2011. In line with the release of the revised IPA Code, the following issues have been identified as differences with the existing APES 330.

1. The revised IPA Code includes the term “Appointee” as a defined term.
2. IPA has revised the definition of “Associate” to incorporate relevant relationships to consider for the DIRRI under the *Bankruptcy Act*.
3. The revised definition of “Firm” in the IPA Code is inconsistent with APES 330.
4. APES 330 should include a definition of “Pre-appointment advice” consistent with the revised IPA Code.
5. APESB should consider including a paragraph on the professional duties of Members in Public Practice involved in transitioning Appointments or acting in parallel Appointments, consistent with the revised IPA Code.

6. APESB should consider clarifying in the existing paragraph 3.7 of APES 330 that where expert assistance has been sought, disclosure of names and qualifications of third parties must be required only for reports relevant to the advice given. This obligation must be limited in respect of legal advice where the provision of such information would result in a waiver of legal professional privilege.
7. APES 330 should incorporate a new paragraph addressing business ownership interests of Members in Public Practice outside of their insolvency practice.
8. As currently drafted APES 330 provides guidance on the issues to consider when determining materiality of a prior Professional Service. This guidance should include reference to the time and fees charged as well as the scope of the Engagement.
9. APES 330 should include a new paragraph addressing relationships with previous or merged Firms, consistent with the revised IPA Code.
10. The prohibition in paragraph 4.9 of APES 330 applicable to pre-appointment advice should be clarified.
11. The prohibition in paragraph 4.9 of APES 330 about advising both a company and its directors in their personal capacity requires clarification.
12. Paragraph 4.14 of APES 330 should be updated in relation to the DIRRI requirements in line with the revised IPA Code.
13. APES 330 should reflect the new requirements of the revised IPA Code in relation to signing of the DIRRI where there is more than one Appointee.
14. APES 330 should include a statement that pre-appointment fees may be drawn where such work is approved under the *Bankruptcy Act*.
15. APES 330 should include factors to consider when determining whether a Contingent Fee arrangement is suitable.

#### **1.4. Summary of Recommendations**

It is recommended that:

1. “Appointee” is included as a defined term in APES 330.
2. In APES 330 the terms “Associate” and “Related Entity” have been defined by linking them to the *Corporations Act* and *Bankruptcy Act*. As there have been no changes to the relevant legislation no changes are recommended. A new paragraph 4.15 to be included to define the applicable relationships to consider when issuing the DIRRI for Appointments under the *Bankruptcy Act*.

3. The definition of “Network” and “Network Firm” to be included in the revised APES 330 and the paragraphs that deal with Independence to be reviewed for proper inclusion of the terms.
4. The revised APES 330 to include a definition of “Pre-appointment advice” in a manner consistent the revised IPA Code.
5. Include a new paragraph on professional duties of Members in Public Practice involved in transitioning Appointments or acting in parallel Appointments, consistent with the revised IPA Code
6. Existing paragraph 3.7 of APES 330 to be amended to clarify that the disclosure requirements apply only to relevant reports and additional guidance be included in respect of legal advice.
7. Insert a new paragraph in section 4 addressing ownership of other business interests of Members in Public Practice aside from their insolvency practice.
8. Amend paragraph 4.8 of APES 330 to include reference to limited time and fees when determining materiality of a prior Professional Service.
9. A new paragraph addressing the relationships with previous or merged Firms be included in APES 330 after paragraph 4.8.
10. Paragraph 4.9 to be amended to clarify the prohibition in respect of pre-appointment advice.
11. A new guidance paragraph be inserted following paragraph 4.9 to clarify that the provision of general information on the insolvency process is permissible.
12. Update the DIRRI requirements in line with those contained within the revised IPA Code.
13. A new paragraph to be inserted in APES 330 to align the DIRRI signing requirements where there is more than one Appointee.
14. APES 330 to include commentary that reflects the legislative provision addressing pre-appointment fees where work is approved under the *Bankruptcy Act*.
15. APES 330 should include factors to consider when determining whether a Contingent Fee arrangement is suitable.

## **1 Review of Issues raised due to differences with the 2<sup>nd</sup> edition of the IPA Code of Professional Practice**

### **2.1 The revised IPA Code has defined the term “Appointee”.**

#### **Issue**

The term “Appointee” is used to make reference to a Member in Public Practice appointed to an Administration. The revised IPA Code has included this as a new definition.

#### **Impacted Stakeholders**

Members in Public Practice, Firms and professional accounting bodies.

#### **Recommendation**

It is recommended that the term “Appointee” be included as a defined term as follows:

*Appointee* means a Member in Public Practice appointed to an Administration.

### **2.2 IPA has revised the definition of “Associate” to incorporate relevant relationships to consider for the DIRRI under the *Bankruptcy Act*.**

#### **Issue**

The *Corporations Act* defines and uses the term Associate whilst the *Bankruptcy Act* uses the term Related Entity. Both the original IPA Code and APES 330 referred to those defined terms. On review of the IPA Code, IPA has decided that the definition of Related Entity used from the Bankruptcy Act was too wide for the purposes of considering relationships that need to be considered in the *Declaration of Independence and Relevant Relationships and Indemnities (DIRRI)*. Accordingly, the IPA has developed a more limited definition of Associate in respect of personal bankruptcies. The *Corporations Act* definition was then incorporated to give one new definition of Associate which appears in the revised IPA Code. IPA has suggested that similar amendments be made to APES 330.

#### **Impacted Stakeholders**

Members in Public Practice, Firms and professional accounting bodies.

### Recommendation

In APES 330 the relevant terms have been defined with reference to the *Corporation Act* or the *Bankruptcy Act*. As there have been no legislative changes to these Acts, there is no need to amend the existing definitions.

As the main issue is to define a more limited number of relationships than Related Entity (as defined in the *Bankruptcy Act*) to whom the DIRRI is applicable, another way to achieve this outcome is to insert a new paragraph 4.15 which specifies the relationships to consider when issuing a DIRRI for Appointments under the *Bankruptcy Act*.

### **2.3 The revised definition of Firm in the IPA Code of Professional Practice is inconsistent with the definition of Firm in APES 330.**

#### Issue

The revised IPA Code of Professional Practice has extended the definition of “Firm” to capture entities where practices are operating under the same or substantially the same business name, whatever the financial arrangement. IPA also recommends the removal of the reference to Auditor General.

The reasoning behind this decision by the IPA is that groups of Firms that have no common ownership or profit sharing arrangements have come together as a group of affiliated practices that market themselves as a “national practice”. In the public eye they are viewed as being one firm and therefore should be treated as such for independence purposes. The revised definition that has been recommended by the IPA is as follows:

***Firm*** means:

- (a) a sole practitioner, partnership, corporation or other entity of professional accountants;
- (b) an entity that controls such parties through ownership, management or other means;
- (c) an entity controlled by such parties through ownership, management or other means; or which they share in the profits; or
- (d) ~~an Auditor General’s office or department~~
- (d) practices operating under the same or substantially the same business name, whatever the financial arrangement.

### **Impacted Stakeholders**

Members in Public Practice, Firms and professional accounting bodies.

### **Recommendation**

APES 330 currently has the definition of Firm which is used consistently across all APES Standards including the Code.

In respect of the issue with Firms that have common ownership, profit sharing etc., APES 110 already addresses this with use of the definitions of Network and Network Firm. These definitions are already in use in the Code in respect of Auditor Independence.

Accordingly, rather than amending the definition of Firm, it is proposed that the definitions of Network and Network Firm be used in APES 330 in a similar manner to APES 110.

In respect of the Auditor-General's issue this limb will not be applicable as it is generally not used in Insolvency Services. From a consistency perspective it is recommended that no change be made and the standard definition of "Firm" used in all APESB standards be retained.

## **2.4 APES 330 should include a definition of "Pre-appointment advice" consistent with the revised IPA Code.**

### **Issue**

The revised IPA Code contains a new defined term "Pre-appointment advice". This term is used in the revised IPA Code and the new definition is likely to assist Members in Public Practice.

### **Impacted Stakeholders**

Members in Public Practice, Firms and professional accounting bodies.

### **Recommendation**

The following defined term to be included in APES 330:

***Pre-appointment advice*** means any professional advice, whether providing an opinion or not, provided prior to the Appointment, to the insolvent Entity or if the insolvent Entity is a Company, its directors.

**2.5 APESB should consider including a paragraph on the professional duties of Members involved in transitioning Appointments or where there are parallel Appointments, consistent with the revised IPA Code.**

**Issue**

The revised IPA Code contains a new principle addressing the professional duties of Members in transitioning Appointments or where there are parallel Appointments. The need to include this was driven by issues that arose from IPA members not reasonably assisting/cooperating when they were transitioning or acting in concurrent Appointments.

The following new paragraph has been suggested for inclusion in section 3 of APES 330 under the heading of “Professional competence and due care”:

When dealing with other Members in Public Practice in transitioning Appointments or where there are parallel Appointments, a Member shall be professional and co-operative, without compromising the obligations of the Member in their own particular Appointment.

**Impacted Stakeholders**

Members in Public Practice, Firms and professional accounting bodies.

**Recommendation**

Include a new paragraph in section 3 of APES 330 as drafted above.

**2.6 Where expert assistance has been sought, APESB should consider clarifying that disclosure must be only included in reports relevant to the advice given. Further this obligation must be limited in situations where provision of such information would result in a waiver of legal professional privilege.**

**Issue**

The existing Paragraph 3.7 of APES 330 mandates that the Member in Public Practice disclose the name and qualifications of third parties where expert assistance has been sought. As currently drafted, the Member is required to disclose such information in “any reports or other relevant communications”. It has been suggested that this requirement is only necessary for “relevant reports” to the advice as opposed to “any reports”.



In addition, where expert assistance has been sought, the IPA has suggested that the obligation to disclose the name and qualifications should not extend to situations where the provision of such information would result in a waiver of legal professional privilege.

**Impacted Stakeholders**

Members in Public Practice, Firms and professional accounting bodies.

**Recommendation**

It is recommended that “relevant reports” replace the phrase “any reports” in the existing paragraph 3.7 of APES 330. In addition, it is recommended that an additional sentence be added to the end of paragraph 3.7 stating the following:

The obligation does not extend to legal advice in situations where the provision of this information would result in a waiver of legal professional privilege.

**2.7 APES 330 should include a new paragraph dealing with ownership of businesses by Members outside of their insolvency practice.**

**Issue**

A paragraph addressing circumstances where Members in Public Practice have substantial ownership and control of a similar business that is operating in the same market as the company to which that Member is appointed was considered necessary in the revised IPA Code.

**Impacted Stakeholders**

Clients, Members in Public Practice, Firms and professional accounting bodies.

**Recommendation**

It is recommended that the following paragraph be included in APES 330 after the existing paragraph 4.6:

Where the Member in Public Practice, in a capacity other than as an Appointee, has a controlling interest in, or the ability to influence, a business operating in the same, or principally the same market as the insolvent Entity, the Member shall consider whether this creates a threat to the Member’s Independence.

## **2.8 Clarification of scope when considering the materiality of prior Professional Services**

### **Issue**

The existing paragraph 4.8 which discusses prior Professional Services that are immaterial should be amended to clarify that an Engagement is immaterial not just on the basis of how wide the scope of the Engagement was, but also on the amount of time spent and the fees generated from the Engagement.

### **Impacted Stakeholders**

Clients, Members in Public Practice, Firms and professional accounting bodies.

### **Recommendation**

Paragraph 4.8 of APES 330 should be amended to read as follows:

A prior Professional Service is considered immaterial if it:

- was of limited scope, and limited time and/or fees;
- will not be subject to review by the Member during the course of the Administration;
- will not affect the Member's ability to comply with the statutory and fiduciary obligations associated with the Administration; and
- does not create threats to the Member's ability to comply with the fundamental principles of the Code when performing the duties of the Administration.

## **2.9 APES 330 should include a new paragraph addressing relationships with previous or merged firms, consistent with the revised IPA Code.**

### **Issue**

The revised IPA Code contains a new paragraph that addresses the fact that IPA members need to consider relationships that they may have had during the relevant period from a prior Firm or pre-merger Firm when assessing Independence.

### **Impacted Stakeholders**

Clients, Members in Public Practice, Firms and professional accounting bodies.

**Recommendation**

The following paragraph to be included after the existing paragraph 4.8:

If a Member in Public Practice has moved Firms or two or more Firms have merged in the preceding two years, the Member shall consider any relationships that the insolvent Entity may have had with the previous Firm(s) or Network Firms during the time that the Member was a Partner.

**2.10 APES 330 should clarify that the restrictions contained within paragraph 4.9 apply to pre-appointment advice only.**

**Issue**

The restrictions contained within paragraph 4.9 of APES 330 apply to pre-appointment advice and do not, for example, restrict an IPA member from providing advice to a person where the IPA member had previously been appointed to a company of which the person was a director and the insolvency Appointment to the company has been finalised.

**Impacted Stakeholders**

Clients, Members in Public Practice, Firms and professional accounting bodies.

**Recommendation**

The following editorial change is required to clarify the requirement in paragraph 4.9:

A Member in Public Practice shall not concurrently provide pre-appointment advice to both an insolvent Entity and if the insolvent Entity is a Company, the insolvent Entity's directors in their personal capacity, as the threat created would be so significant that no safeguard could reduce the threat to an acceptable level.

**2.11 APES 330 should contain a paragraph to clarify the prohibition about advising both a director personally and their company.**

**Issue**

APESB should consider clarifying the situation about providing advice to both the insolvent Entity and its directors in their personal capacity. Advice must not be given to both the director personally and their company. However, providing general information on the insolvency process and its consequences is considered acceptable. Inclusion of a

guidance paragraph to this effect is consistent with the approach taken in the revised IPA Code.

**Impacted Stakeholders**

Clients, Members in public practice, firms and professional accounting bodies.

**Recommendation**

It is recommended that APES 330 to include the following guidance after paragraph 4.9:

A Member in Public Practice can provide general information to both the insolvent Entity and if the insolvent Entity is a Company, the insolvent Entity's directors in their personal capacity on the insolvency process and the consequences of insolvency.

**2.12 The DIRRI requirements in APES 330 should be updated to ensure consistency with the requirements of the revised IPA Code.**

**Issue**

The revised IPA Code has extended the disclosure required in the DIRRI to clarify that:

- Details of the circumstances of the Appointment must be disclosed;
- The type of information that must be disclosed in respect of prior Professional Services; and
- The type of information must be disclosed in respect of indemnities or upfront payments.

**Impacted Stakeholders**

Clients, Members in Public Practice, Firms and professional accounting bodies.

**Recommendation**

The following changes should be made to paragraph 4.14 to align APES 330 with the disclosure requirements of the revised IPA Code:

A Member in Public Practice shall include the following in the *Declaration of Independence and Relevant Relationships and Indemnities*:

- a declaration that the Member has undertaken an evaluation of the significance of any threats to Independence and that the

Member determined that the Member is independent for the purpose of accepting the Appointment in accordance with the requirements of the relevant legislation and this Standard;

- a declaration setting out the circumstances of the Appointment including the number of meetings and time period over which advice was provided, a summary of the general nature of the issues discussed, the amount of any remuneration received for this advice and an explanation as to why such meetings do not result in a conflict of interest or duty;
- a declaration setting out all relationships the Member or the Member's Firm or Network Firm has had in the preceding two years with:
  - the insolvent Entity;
  - an Associate or ~~Related Entity~~ of the insolvent Entity;
  - a former Appointee of the insolvent Entity; or
  - a person who has a charge over the whole or substantially the whole of the insolvent Entity's property and other assets;

and the reasons why these relationships, if any, do not result in a conflict of interest or duty;

- a declaration of prior Professional Services provided to the insolvent Entity by the Member, the Member's Firm or Network Firm, including the nature of the Professional Services, when the Professional Service was provided, the period over which the Professional Service was provided, the Professional Fees paid and the reasons why those Professional Services do not ~~create threats to the Independence of the Member or the work to be performed or duties required under the proposed Appointment~~ result in a conflict of interest or duty;
- a declaration that there are no other known prior Professional Services or other relevant relationships that require disclosure; and
- a declaration of indemnities (other than statutory indemnities) and upfront payments, including the identity of each indemnifier or provider of an upfront payment (name and relationship with the insolvent Entity) and the extent and nature of each indemnity or upfront payment, including any indemnities in respect of the Member's Professional Fees or Expenses a statement as to where the funds are being held, when and how the funds will be applied and that there are no other indemnities or upfront payments to be disclosed.

**2.13 APES 330 should reflect the new requirement of the revised IPA Code in relation to signing of the DIRRI where there is more than one Appointee.**

**Issue**

ASIC requires that where there is more than one Appointee, all Appointees must sign the DIRRI. In practice however situations may arise where this cannot occur due to circumstances such as travelling to the location of the Appointment etc. In response to this issue, the IPA has inserted a requirement into the revised IPA Code regarding signing the DIRRI where there is more than one Appointee. The new requirement is that all Appointees must sign the DIRRI except in exceptional circumstances. Thereafter it places a series of requirements around the reissuing of the DIRRI when all Appointees are available to sign it. It is recommended that APES 330 be revised in a similar manner.

**Impacted Stakeholders**

Clients, Members in Public Practice, Firms and professional accounting bodies.

**Recommendation**

It is recommended that the following paragraph be inserted after the existing 4.14 in APES 330:

Where more than one Member in Public Practice is appointed to an insolvent entity, all Appointees shall sign the *Declaration of Independence, Relevant Relationships and Indemnities* unless there are exceptional circumstances which prevent that occurring. If the *Declaration of Independence, Relevant Relationships and Indemnities* is issued without all Appointees signing it, a replacement *Declaration of Independence, Relevant Relationships and Indemnities* with all Appointees' signatures shall be provided to creditors as soon as possible.

**2.14 APES 330 should include a statement that pre-appointment fees may be drawn where the work is approved under the *Bankruptcy Act*.**

**Issue**

There is scope in the *Bankruptcy Act* for a trustee to have pre-appointment fees approved by creditors. This legislative provision has been reflected in the revised IPA Code and should also be included in APES 330.

**Impacted Stakeholders**

Clients, Members in Public Practice, Firms and professional accounting bodies.

**Recommendation**

Paragraph 8.7 of the standard to be amended in the following manner. A new paragraph should also be added as follows:

8.7 A Member in Public Practice who has accepted an Appointment, other than as a Controller or a bankruptcy trustee, shall obtain court approval when the Member makes a claim in respect of Professional Fees for any pre-appointment work performed in respect of an Appointment.

NEW A Member in Public Practice who is appointed as a bankruptcy trustee may draw Professional Fees for pre-appointment work where that work is approved in accordance with the *Bankruptcy Act*.

**2.15 APES 330 should include factors to consider when determining whether a Contingent Fee arrangement is suitable in respect of an Appointment.**

**Issue**

The IPA was requested to provide more guidance around factors for practitioners to consider when determining whether a Contingent Fee arrangement may be suitable for a particular Administration.

**Impacted Stakeholders**

Clients, Members in Public Practice, Firms and professional accounting bodies.

**Recommendation**

APES 330 should be revised to include the following text after paragraph 8.8:

When considering whether a Contingent Fee arrangement might be a suitable Professional Fee arrangement in a particular Administration, a Member in Public Practice shall consider:

- funds available to the Administration;
- funding from alternate sources such as creditors or a litigation funder;

- costs of the alternate source of funds versus the Contingent Fee arrangement;
- risk associated with the tasks to be undertaken for the Contingent Fee; and
- the appropriateness of the possible Contingent Fee amount considering the nature of the Administration and the risk associated with the task to be undertaken.